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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 710

THE CELOTEX CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX.

	PAGE
Citations to Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
1. Profit Information Issue	3
2. Unilateral Issue	5
Reasons for granting the writ	6
Conclusion	12
Appendix A—Statute	13
B—Opinion, Decree, and Order Denying Rehearing below	15
C—Notice on handling employee complaints	25

CITATIONS.

Cases.

Curtiss-Wright Corp. v. NLRB, 3 Cir., 1956, 347 F. 2d 61	7
Dallas General Drivers etc. v. NLRB, D. of C. Cir., 1966, 355 F. 2d 842	9
District 50, United Mine Workers v. NLRB, 4 Cir., 1966, 358 F. 2d 234	11
General Electric Co., 137 NLRB 1684	12
NLRB v. Fitzgerald Mills Corp., 2 Cir., 1963, 313 F. 2d 260	12

NLRB v. Insurance Agents International Union, 361 U. S. 477 ..... 6, 12

NLRB v. Katz, 369 U. S. 736 ..... 6, 10

NLRB v. W. L. Rives Company, 5 Cir., 1964, 328 F. 2d 464 12

NLRB v. Truitt Mfg. Co., 351 U. S. 149 ..... 5, 6, 7, 10

NLRB v. Yawman & Erbe Mfg. Co., 2 Cir., 1951, 187 F. 2d 947 7

Old Line Life Insurance Company of America, 96 NLRB 499 10

Square D Company v. NLRB, 9 Cir., 1964, 332 F. 2d 360 8

United Fire Proof Warehouse Co. v. NLRB, 7 Cir., 1966, 356 F. 2d 494 9

Statute.

National Labor Relations Act, as amended, 61 Stat. 136, as amended by 73 Stat. 519, 29 U. S. C. §§ 158, 159 ..... 2, 3, 6, 11, 12

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entiled case on June 28, 1966.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals is unreported and is printed in Appendix B hereto (pp. 15-20, *infra*). The Decision and Order of the National Labor Relations Board (R. 120-124) is reported in 146 NLRB 48; the underlying Intermediate Report of the Trial Examiner (R. 53-91) is reported in 146 NLRB 50.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 28, 1966 (pp. 15-20, *infra*). Rehearing was denied on August 4, 1966 (p. 24, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

Whether an employer in the course of collective bargaining is obligated, upon the union's demand, to furnish profit information which is not related to bargaining issues, when the employer is proposing wage increases.

Whether an employer may make a minor change in working conditions after expiration of a collective agreement, after notice to the union, after the parties have reached an impasse in negotiations, and after the union has unilaterally effected changes in working conditions, where there is no purpose or effect of undermining the union's status.

STATUTE INVOLVED.

The statutory provisions involved are Sections 8(a) (1) and (5), 8(d) and 9(a) of the National Labor Relations Act, as amended, 61 Stat. 136, as amended by 73 Stat. 519, 29 U. S. C. Sections 158 and 159. They are printed in Appendix A, pp. 13-14, *infra*.

STATEMENT.

This case was presented to the Court of Appeals on petition of the Board (R. 1) to enforce its Order against Celotex (petitioner here) pursuant to the National Labor Relations Act, as amended (61 Stat. 136, as amended by 73 Stat. 519, 29 U. S. C., Sections 151 *et seq.*). The Order of the Board resulted from the usual procedure upon charges against

Celotex filed by Local No. 4-179 of The Oil, Chemical and Atomic Workers International Union. The General Counsel's claims of a dozen violations of the Act were reduced by the Trial Examiner to five violations (R. 53-91) and by the Board to two (R. 120-124). Without making any specific comments of its own about the two violations it adopted, the Board held that Celotex violated Section 8(a)(5) of the Act by refusing to furnish profit information during negotiations with the Union and by instituting changes in its grievance machinery unilaterally. The Court of Appeals affirmed except for modifying the remedial provisions of the Order (pp. 15-20, *infra*).

1. Profit Information Issue.

Celotex operates 8 manufacturing plants in several States. At its Marrero, Louisiana, plant, with which this case is concerned, it makes some 900 different products. The plant was constructed in 1921 and has been operated under contracts with the Union since 1941. During a one year term beginning March 8, 1961, Celotex and the Union were parties to a lengthy agreement in which Celotex agreed (as it had before) to substantial restrictions on its power to schedule operations, to assign employees to particular jobs and to compel them to work overtime when and as needed. When negotiations for a new contract began on February 12, 1962, Celotex asserted that it needed relief from such restrictions to reduce unit costs in order to attract more business. It asserted that its goal was to obtain more business without taking anything away from employees (p. 17, *infra;* JA 169-181, 212, 297).[1]

In negotiations, Celotex made specific proposals to change the old contract provisions to achieve its purposes.

1. The printed Joint Appendix is R. 125, page references therein being numbers following "JA." They concern undisputed evidence not clearly reflected in findings below.

It stressed the fact that productive capacity had increased by 50% in the industry while Marrero operations were down to 75% of capacity; the number of Marrero employees had fallen from 2100 in 1956 to 1500 in 1962 (p. 17, *infra*). The Union negotiators were aware of this shrinkage in production and employment (R. 59).

In 21 negotiating sessions, the subject of wage rates was discussed for about one hour (JA 94). It was not a serious issue because Celotex proposed an across-the-board increase of five cents an hour, only two cents an hour less than the Union's demand, and Celotex also proposed more costly insurance benefits (JA 196, 209, 288).

With respect to savings it expected to realize because of its proposed changes, Celotex furnished its best estimates upon the Union's demand, and it furnished other financial data requested by the Union, including corporate profit information (R. 60).

When the Union demanded profit information concerning Marrero plant operations, Celotex refused to furnish it on the ground of relevance and for the reason that its available figures would not be meaningful. The only available figures on plant profit were gross figures, as no formula for allocating corporate overhead had yet been computed (p. 18, *infra*).

At one point, the Union conceded that Celotex had no obligation to furnish profit data (JA 257). Celotex stated that it was not pleading inability to pay and told the Union "We can pay whatever we think is right to pay." Pressing its demand for gross profit figures for Marrero, the Union insisted that: "You haven't convinced us that Marrero is in bad shape. If you can show us, then this Union will be willing to work with you to get relief" (p. 18, *infra*).

The Trial Examiner concluded that Celotex was inversely pleading inability to pay because its proposals

would reduce costs. The Board affirmed without comment. The Court of Appeals held that the profit data "must be disclosed unless it plainly appears irrelevant," with the comment that its relevancy here "is not so clear as it was in the leading case of *NLRB* v. *Truitt Mfg. Co.*, 1956, 351 U. S. 149" (pp. 18-19, *infra*).

2. Unilateral Issue.

The 1961 agreement provided for presentment of grievances largely by Union representatives (JA 165-167), and it provided that employees lost recourse to the grievance machinery by engaging in slowdown activities (JA 162-163). The contract expired March 8, 1962. On and after March 19, 1962, the Union and employees engaged in unprotected slow-downs and work refusals continuously until they called a normal strike on May 1, 1962 (R. 73-76, 122-123). On March 23, negotiations were suspended in a general impasse (R. 66, 121). On March 27 and on March 28, Celotex met with and notified the Union's two chief officers about changes in the grievance machinery; no objection being made, Celotex posted a notice to employees on March 28 entitled "Procedure for Handling Employee Complaints" to be in effect "during this period without a Labor Agreement" which granted the employees a choice of presenting complaints to supervisors themselves or with Union officials (JA 95-98); the notice is printed in Appendix C hereto (p. 25, *infra*). Notification to the two Union officers was the customary method of providing notice of changes in working conditions to the Union (JA 87) and the Board found it "sufficient advance notification" of another change which it found proper (R. 121).

The Trial Examiner concluded that this notice was in derogation of the Union's status (R. 81-2). The Board made no comment. The Court of Appeals affirmed on the

basis that the refusal to furnish profit data removed the good faith element in the defense of protected unilaterality following a good faith impasse.

With respect to good faith, the Trial Examiner found that Celotex had bargained generally in good faith (R. 55), as did the Board (R. 120).

REASONS FOR GRANTING THE WRIT.

Profit information and unilateral action are, and probably will be, frequently recurring subjects in Board litigation. Accordingly, the questions presented are important in the administration of the National Labor Relations Act, as amended. The decision below conflicts with decisions of four Courts of Appeals on profit information, and it misconstrues and misapplies the leading decisions of this Court in the *Truitt*[2] (profit information) and *Katz*[3] (unilateral action) cases.

1. The Court below approached the subject of profit information from "an erroneous view of collective bargaining" in the language of this Court in the *Insurance Agents'* case where the basic point was made that "collective bargaining . . . cannot be equated with an academic collective search for truth . . . The parties . . . still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest."[4] In the parties' struggle to reach an agreement, it is not appropriate to impose upon them "discovery procedures under modern codes" (p. 18, *infra*) as the measure of their duty to disclose financial data, or tactical plans and resources on both sides for strikes or lockouts, even though the reference to discovery procedures is appropriate in a wage data context. The duty

2. *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149.
3. *NLRB* v. *Katz*, 369 U. S. 736.
4. *NLRB* v. *Insurance Agents International Union*, 361 U. S. 477, at 488.

of disclosure must have limits, depending upon the nature of data to be disclosed, if the parties are to be free to proceed according to "concepts of self-interest," unfettered by the unrealistic discipline of "an academic collective search for truth."

In wage data cases, there is a presumptive relevance of the data to basic bargaining issues of wages, hours, and benefits. No such presumption arises from the nature of profit data where relevance must be supplied by the bargaining claims of the employer, as evidenced by this Court's rationale in *Truitt*. Unnecessary in wage cases, the employer's claim is essential in profit cases as a foundation for a duty of disclosure. In the case at bar, the Court of Appeals obliterated this difference by applying the wage rule to its profit case; it quoted from the *Yawman & Erbe*[5] decision (a wage case) in announcing that "data of this kind . . . must be disclosed unless it plainly appears irrelevant." (pp. 18-19, *infra*).

This ruling is contrary to that of the Third Circuit in *Curtiss-Wright Corp.* v. *NLRB*, 1965, 347 F. 2d 61, at 69, where the court said:

> "In reality, *Woodworkers* follows *Boston Herald-Trav. Corp.* v. *N. L. R. B.* and stands for the following proposition of law: *wage and related information* pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth; *as to other requested data, however, such as employer profits* and production figures, *a union must*, by reference to the circumstances of the case, as an initial matter, *demonstrate more precisely the relevance of the data* it desires. Thus, the standard, relevancy of the data, is the same for all cases, but the manner in which a

5. *NLRB* v. *Yawman & Erbe Mfg. Co.*, 2 Cir. 1951, 187 F. 2d 947.

union can demonstrate that its requests conform to the standard shift with the type of information desired."

* * * * *

"It is clear that usually a union's request for data concerning an employer's financial status must be supported with sufficient circumstances to demonstrate relevance. In *Truitt*, the employer's claim that it was financially unsound and could not grant a wage increase because of its financial status, together with its inability to defend its refusal, established the relevance of the union's request. *Truitt* is, therefore, quite consistent with the legal standard accepted and applied in the instant case." (Italics added.)

The foregoing reasoning of the Third Circuit, that a demand for profit (or other non-wage) information must be supported by a demonstration of relevance to bargaining issues, is supported by the decision of the Ninth Circuit in *Square D Company* v. *NLRB*, 1964, 332 F. 2d 360, at 367, as follows:

"[2] The Supreme Court has cautioned that the question whether requested information is sufficiently pertinent and necessary to the Union's negotiations that the refusal to furnish it constitutes refusal to bargain in good faith, is dependent upon close scrutiny of the factual circumstances of each case. *N. L. R. B.* v. *Truitt Mfg. Co.* (1956), 351 U. S. 149, 153-154, 76 S. Ct. 753, 100 L. Ed. 1027.

"Here we have no clear indication that this issue was even tried. We have no specific findings by the Board to the effect that the Company did commit such a violation of the Act, explaining the basis for such a conclusion. We conclude that the record does not support the Board's contentions in this respect."

In the case at bar, the Union failed to demonstrate the relevance of profit data. Indeed, it admitted that the data did not have to be supplied (JA 257). The Union negotiators failed to mention the subject at all during 16 con-

secutive meetings over a period of three months (JA 257, 298). The subject was not even mentioned by the Union in its expression of bargaining issues (JA 286-8) or in its various charges filed with the Board (R. 8-11, 14-17). Such neglect is a practical demonstration of irrelevance.

2. The Court below also equates an employer's proposals to become more competitive with a plea of inability to pay (p. 17, *infra*), contrary to the holding of the District of Columbia Circuit in *Dallas General Drivers etc.* v. *NLRB*, 1966, 355 F. 2d 842, 845, where the court stated:

> "[7] The claim that the Board erred in refusing to order the Company to reveal its financial position is not well founded. The Company's position on wages was not based on a claim of financial inability to pay but on the ground that it was paying rates in excess of prevailing rates of its competition in the same labor market."

3. Moreover, the Court below effectively adopts the Trial Examiner's rationale (R. 64) that a proposal to reduce costs is equivalent to a plea of inability to pay higher wages, contrary to the decision of the Seventh Circuit in *United Fire Proof Warehouse Co.* v. *NLRB*, 1966, 356 F. 2d 494, at 498, where the Court said:

> "A review of the record as a whole indicates to us that the conclusion of the Board was not well founded. It is obvious that the employers wanted a wage cut in order to relieve the drain of subsidization of unprofitable local moving. But the testimony does not indicate that they contended they could not meet the wage increases requested, but rather that they simply would not meet it. Where the evidence disclosed 'won't,' the Board found 'can't.'
>
> *"If the employers claimed that they were unable to pay, the union had a right to be shown evidence of inability. But when the employers refused to pay, the union knew all it was entitled to know.* In such a situation, further financial information from the employer's

records would be interesting and perhaps useful to the union; but not required; for such information cannot convert stubborn resolution into an excuse for failure to grant a wage increase or provide the basis for mutual bargaining concessions occasioned by a common understanding of financial plight." (Italics added.)

4. The Court below clearly did not heed the admonition of this Court in *Truitt*:

> *"We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence.* Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." (Italics added.)[6]

In the case at bar, Celotex was proposing a wage increase, and its proposals to change the contract were designed to obtain more business and more secure employment; it did not raise economic inability as an argument against increased wages.

5. Turning to the unilateral issue, it is important that the useful concept of unilateral action be limited to its proper function, i.e., preventing disparagement of the union.[7] The mechanical extension of this concept to cover every term of an expired contract, however trival and however justified by particular circumstances, is a perversion of principle and an invitation to pointless litigation. To operate a plant after expiration of a contract, as if the contract were in effect, is an exercise contrary to fact. Some play in the joints is necessary. A breach of contract is not *per se* an unfair labor practice;[8] a minor departure

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6. *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149, 152-4.

7. *NLRB* v. *Katz*, 369 U. S. 736.

8. *Old Line Life Insurance Company of America*, 96 NLRB 499, at 500.

from the terms of an expired contract is not bad faith, especially after impasse and after notice.

Celotex notified the Union twice in meeting with Union agents who voiced no objection to the posting of the Notice, Appendix C (p. 25, *infra*). Similar advance notice of another unilateral act in this case was deemed "sufficient" by the Board. Moreover, the change effected was an innocent one insofar as it promoted the purpose of Section 9(a) of the Act to permit individual employees to present grievances; the notice emphasized its own temporary duration and expressly and repeatedly respected the Union's status. Finally, Celotex' departure from the expired contract was trivial when compared with the Union's wholesale departures, in its campaign of unilateral and unprotected slowdowns; the Union demonstrated this triviality by failing to mention the grievance change in its NLRB charges (JA 8-11, 14-17).

The Fourth Circuit recently observed that there should be some limits to the unilateral concept in subcontracting cases in *District 50, United Mine Workers* v. *NLRB*, 1966, 358 F. 2d 234, at 238, as follows:

> "[4] Situations may and often do arise during the life of a collective bargaining contract in which the duty to 'bargain in good faith' may be satisfied by something less than full-scale bargaining. An employer may be obliged under the compulsion of some circumstances to make subcontracting decisions without delay. Emergencies could arise that require immediate action. The employer's prerogative in this class of cases should be respected without requiring prior bargaining or even notification of the union. However, other contracting decisions may not demand immediate action, and respecting these types of decisions, there may be no practical obstacle to notification of the union, and to affording it an opportunity to be heard.
>
> "By notification and discussion, however, we mean an alternative in appropriate cases to full-scale collective bargaining. The union should not be permitted

to stall the company's decision by insistence on protracted negotiations. The company should be permitted, after listening to the union's suggestions, to accept or reject them as its economic judgment dictates. But this does not mean that ordinarily the employer should act without giving notice and an opportunity for exchange of ideas."

This Court has indicated that temporary, unilateral action might be justified;[9] other courts have deemed some unilateral acts too trivial to constitute violations.[10] There must be reasonable limits imposed upon the concept of unilateral violations to avoid a flood of inconsequential cases which would disrupt the proper enforcement of the Act and unduly harass employers; as such limits have not been clearly enunciated, it is important that this Court settle the question.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 18, 1966.

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9. Temporary procedures are not "designed to be permanent conditions of work" which would constitute violations of the Act—cf. *NLRB* v. *Insurance Agents Int. Union*, 361 U. S. 477, 496, in footnote 28.

10. Isolated wage increases or insignificant changes in conditions of employment, unilaterally effected, are not violations of the Act—*NLRB* v. *W. L. Rives Company*, 5 Cir., 328 F. 2d 464, 470; *NLRB* v. *Fitzgerald Mills Corp.*, 2 Cir., 313 F. 2d 260, 267, 268; *General Electric Co.*, 137 NLRB 1684, 1686.

APPENDIX A.

The relevant provisions of the amended National Labor Relations Act, Sections 8(a)(5), 8(d) and 9(a), 29 U. S. C. §§ 158, 159, are as follows:

"§ 158. UNFAIR LABOR PRACTICES.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

* * * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided: . . .

"§ 159. REPRESENTATIVES AND ELECTIONS—EXCLUSIVE REPRESENTATIVES; EMPLOYEES' ADJUSTMENT OF GRIEVANCES DIRECTLY WITH EMPLOYER.

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective

bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 21994.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CELOTEX CORPORATION,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

(June 28, 1966.)

Before RIVES and GEWIN, *Circuit Judges*, and ALLGOOD, *District Judge.*

RIVES, *Circuit Judge*: The Trial Examiner, affirmed by the Board, found that The Celotex Corporation (hereafter Celotex) had violated Section 8(a)(5) and (1) of the National Labor Relations Act[1] by refusing to furnish to

1. "(a) It shall be an unfair labor practice for an employer—
"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
• • • • • • •

the Union during bargaining negotiations certain financial data. The Trial Examiner recommended an order, which the Board adopted, that Celotex cease and desist from refusing to disclose to the Union "upon appropriate request therefor during collective bargaining negotiations, financial records of the Respondent which said Local is entitled to see." The order also required Celotex to take the following affirmative action: "Upon request at an appropriate time, furnish to said Local all financial records of the Respondent which said Local shall be entitled to see." To that part of the recommended order the Trial Examiner appended a footnote which is quoted in the margin.[2]

The Trial Examiner, affirmed by the Board, found also that Celotex violated Section 8(a)(5) and (1) of the Act (see n. 1, *supra*) by unilaterally changing the existing grievance procedure without bargaining thereon with the Union. That finding and the accompanying order[3] depend for their validity on whether an impasse had occurred after bargaining in good faith.[4] The critical issue of good faith

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"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."
29 U. S. C. A. § 158(a)(1) and (5).

2. "11 Two comments are appropriate with respect to this provision: (1) a collective labor agreement is currently in effect, and I do not imply that Local 4-179 is entitled to see the Respondent's financial records prior to negotiations on a succeeding agreement; and (2) the Respondent, in subsequent negotiations, may not demand concessions like those demanded in the 1962 negotiations, and Local 4-179 may not be entitled to see the financial records in such subsequent negotiations."

3. That Celotex cease and desist from "making any changes in the terms and conditions of employees represented by said Local, without first bargaining with said Local thereon, if the nature and circumstances of such changes, unilaterally made, would violate the Act."

4. See *United States* v. *Tex-Tan, Inc.*, 5 Cir. 1963, 318 F. 2d 472, 482.

depends upon the claimed violation by Celotex's refusal to furnish financial data.[5]

Celotex operates eight manufacturing plants in as many States. The plant at Marrero, Louisiana, with which this case is concerned, was constructed in 1921 for the production of insulation board from bagasse, the residual of cane stalk remaining after sugar is extracted. Some 900 different products are made there, and they constitute nearly 40 per cent of the total production of all eight plants. Since 1941, Celotex has operated this plant under contracts with the Union. The record discloses that no unfair labor practice case against Celotex has heretofore been litigated.

During a one-year period beginning March 8, 1961, Celotex and the Union were parties to a detailed contract covering sixty printed pages, in which Celotex agreed to substantial restrictions upon its power to schedule production operations and to assign employees to particular jobs. By the time negotiations for a new contract began on February 12, 1962, Celotex was asserting that it needed relief from those restrictions in order to reduce costs and produce better products because of increased competition in the industry. The number of employees at the Marrero plant had reduced from over 2100 in 1956 to 1500 and operations were down to 75% of capacity. During that interval the insulation board industry had increased its productive capacity by 50%.

While Celotex's main motive appears to have been to remain competitive with the industry, it requested contract revisions which would reduce or eliminate premium overtime pay and would reduce the amount of job seniority each employee would earn.

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5. The order broadly requires Celotex also to cease and desist from "in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act." The order also contains the usual posting and notification provisions.

At one point in the negotiations Celotex specifically denied that it was claiming an inability to pay, and said that "We can pay whatever we think is right to pay." It insisted, however, that concessions from the Union regarding scheduling and incentive pay were necessary to make the Marrero plant competitive and to insure that plant's survival.

Celotex computed gross profit and loss on a plant basis; that is, plant revenues diminished by the plant's manufacturing costs, such as wages and salaries, raw materials, depreciation, insurance, etc., was considered "gross profit" of the plant. "Net profit" was determined only for the corporation as a whole. Corporate overhead included the costs of a research center, of 17 district sales offices, of the Chicago, Illinois, staff which provides traffic, legal, patent, accounting, industrial relations, credit and collection services, and of national executive offices. No proration by plant of corporate overhead items was in existence. Nonetheless, Celotex insisted that "each plant has to absorb its proportionate share of the corporate costs." The Union negotiator insisted on seeing at least the gross profit figures for the Marrero plant, stating: "You haven't convinced us that Marrero is in bad shape. If you can show us, then this Union will be willing to work with you to get relief." Celotex insisted that gross profit figures would not be meaningful and that net profit records of the plant were not maintained, and refused to disclose any of its financial records.

The relevancy of profit and loss data to any proposal is not nearly so clear as it was in the leading case of *NLRB* v. *Truitt Mfg. Co.*, 1956, 351 U. S. 149. It has, however, been well said by the Second Circuit (Judges Learned Hand, Swan and Frank) that:

> "The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. There the information must be

> disclosed unless it plainly appears irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue."

National Labor Relations Bd. v. *Yawman & Erbe Mfg. Co.*, 2 Cir. 1951, 187 F. 2d 947,[6] 949.

Upon the whole record we cannot "displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *NLRB*, 1951, 340 U. S. 474, 488. We therefore hold that the Board properly found that Celotex violated Section 8(a)(5) and (1) of the Act by refusing to disclose to the Union certain of its financial records, including the "gross profits" of the plant, and by unilaterally changing the existing grievance procedure.

Celotex argues that the Board's remedial order is too vague to be enforcible, and its vagueness cannot be disputed. The subject of good faith bargaining is, however, so broad that it would be difficult, if not impossible, under the circumstances of this case to draft a more definite order.[7] We do, however, agree with Celotex that, in the light of its good labor record, that part of the order is too

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6. See also *Boston Herald-Traveler Corporation* v. *NLRB*, 1 Cir. 1955, 223 F. 2d 58, 60, et. seq.; *Curtiss Wright Corp.* v. *NLRB*, 3 Cir. 1965, 347 F. 2d 61, 69; compare *NLRB* v. *Movie Star, Inc.*, No. 21,447, ms. decided May 24, 1966.

7. Compare *Oregon Coast Operators Assn.*, 1955, 113 N.L.R.B. 1338; *Long Bell Lumber Co.*, 1955, 113 N.L.R.B. 1231.

8. Compare *NLRB* v. *Express Publishing Co.*, 1941, 312 U. S. 426, 436; *NLRB* v. *West Texas Utilities Co.*, 5 Cir. 1941, 119 F. 2d 683, 686.

broad[8] which directs Celotex to cease and desist from "in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act."

Except for the part just quoted, the Board's order will be enforced.

MODIFIED AND ENFORCED.

UNITED STATES COURT OF APPEALS.

For the Fifth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
THE CELOTEX CORPORATION,
Respondent.

No. 21994.

DECREE.

Before: RIVES and GEWIN, *Circuit Judges,* and ALLGOOD, *District Judge,* by the court;

THIS CAUSE came on to be heard upon a petition of the National Labor Relations Board for enforcement of its Order, dated February 20, 1964, against Respondent, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on February 10, 1966, and has considered the briefs and transcript of record filed in this cause. On June 28, 1966, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's said order as modified. In conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED by the United States Court of Appeals for the Fifth Circuit that The Celotex Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to disclose to Oil, Chemical and Atomic Workers International Union, Local 4-179, AFL-CIO, upon appropriate request therefor during collective-bargaining negotiations, financial records of the Respondent which said local is entitled to see.

(b) Making any changes in the terms and conditions of employment of employees represented by said Local, without first bargaining with said Local thereon, if the nature and circumstances of such changes, unilaterally made, would violate the National Labor Relations Act, as amended (hereinafter called the Act.)

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Upon request at an appropriate time, furnish to said Local all financial records of the Respondent which said Local shall be entitled to see.

(b) Post in conspicuous places at its plant in Marrero, Louisiana, including all places where notices to employees customarily are posted, copies of the notice attached hereto as Appendix. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Fifteenth Region (New Orleans, Louisiana), shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director in writing within 10 days from the date of this Decree what steps the Respondent has taken to comply herewith.

Entered: Aug. 12, 1966.

(Original Filed—August 12, 1966).

APPENDIX.

Notice to All Employees

As Ordered By

A Decree of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board.

We are posting this notice to inform our employees of the rights guaranteed them in the National Labor Relations Act:

We Will Not refuse to disclose to Oil, Chemical and Atomic Workers International Union, Local 4-179, AFL-CIO, during collective-bargaining negotiations, any of our financial records which Local 4-179 shall be entitled to see.

We Will Not make any changes in the terms and conditions of employment of employees represented by Local 4-179, without first bargaining with Local 4-179 thereon, if the nature and circumstances of such changes, unilaterally made, would violate the National Labor Relations Act.

THE CELOTEX CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If the employees have any questions concerning this notice or whether the Employer is complying with its provisions, they may communicate with the Labor Board's Regional Office, Room T6024 Federal Building (Loyola), 701 Loyola Avenue, New Orleans 12, Louisiana. (Tel. No. 529-2411.)

IN THE UNITED STATES COURT OF APPEALS.
For the Fifth Circuit.

No. 21994.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

THE CELOTEX CORPORATION,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting in Washington, D. C.

(August 4, 1966)

ON PETITION FOR REHEARING.

Before RIVES and GEWIN, *Circuit Judges,* and ALLGOOD, *District Judge.*

PER CURIAM:

The petition for rehearing filed by the respondent is hereby DENIED.

APPENDIX C.

March 28, 1962
Marrero, La.

NOTICE.

PROCEDURE FOR HANDLING EMPLOYEE COMPLAINTS.

Since March 8, 1962, the Company and Local 4-179, OCAW, have been operating on a day to day basis without a Labor Agreement.

Without a Labor Agreement in effect, there is no provision for employee grievances alleging a contract violation. It is the company's desire, however, to properly consider employee complaints and the purpose of this notice is to clearly define the procedure that may be followed by an employee who has a complaint during this period without a Labor Agreement.

1. An employee who has a complaint may discuss it with his Supervisor, either with or without his department committeeman.
2. If the employee is not satisfied with the answer from his Supervisor, he may discuss it with his Department Head either with or without his department committeeman.
3. If an employee is not satisfied with the answer from the Department Head, he may discuss it with the Manager of Industrial Relations with the following in attendance if the employee so desires:

Department Committeeman
President of the Union
Local Business Representative

(Signed) E. G. Vargon,
E. G. Vargon,
Manager, Industrial Relations.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	2
A. The Board's findings of fact	2
1. Refusal to furnish financial information	2
2. Unilateral changes in the grievance procedure	7
B. The decisions of the Board and the court of appeals	8
Argument	9
Conclusion	13

CITATIONS

Cases:

Curtiss-Wright Corp. v. *National Labor Relations Board*, 347 F. 2d 61	11
Dallas General Drivers, Local No. 745 v. *National Labor Relations Board*, 355 F. 2d 842, affirming 151 NLRB 1359	10
Industrial Union of Marine and Shipbuilding Workers v. *National Labor Relations Board*, 320 F. 2d 615, certiorari denied *sub nom. Bethlehem Steel Co.* v. *National Labor Relations Board*, 375 U.S. 984	13
May Department Stores Co. v. *National Labor Relations Board*, 326 U.S. 376	12
National Labor Relations Board v. *American National Insurance Co.*, 343 U.S. 395	9
National Labor Relations Board v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217	12

238-346—66——1

Cases—Continued

	Page
National Labor Relations Board v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475	11
National Labor Relations Board v. *Item Co., The*, 220 F. 2d 956, certiorari denied, 350 U.S. 836	11
National Labor Relations Board v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319	10
National Labor Relations Board v. *Jacobs Mfg. Co.*, 196 F. 2d 680	9
National Labor Relations Board v. *Katz*, 369 U.S. 736	12
National Labor Relations Board v. *Southland Cork Co.*, 342 F. 2d 702	9
National Labor Relations Board v. *Taylor*, 338 2d 1003, enforcing 141 NLRB 765	9, 10
National Labor Relations Board v. *Truitt Mfg. Co.*, 351 U.S. 149	9, 11
National Labor Relations Board v. *Western Wirebound Box*, 356 F. 2d 88	9
National Labor Relations Board v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947	10
Steelworkers v. *Warrior & Gulf Navigation Co.* 363 U.S. 574	12
Sylvania Electric Products, Inc. v. *National Labor Relations Board*, 358 F. 2d 591, certiorari denied, October 10, 1966, No. 373, this Term	10
Timken Roller Bearing Co. v. *National Labor Relations Board*, 325 F. 2d 746, certiorari denied, 376 U.S. 971	11
United Fire Proof Warehouse Co. v. *National Labor Relations Board*, 356 F. 2d 494	10
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)	2
Section 8(a)(5)	9

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 710

THE CELOTEX CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–20) is reported at 364 F.2d 552. The findings of fact, conclusions of law, and order of the Board (R. 53–90, 120–124)[1] are reported at 146 NLRB 48.

JURISDICTION

The decision of the court of appeals was entered on June 28, 1966; a petition for rehearing was denied on August 4, 1966; and the decree was entered on August 12, 1966 (Pet. App. 15, 21–23, 24). The peti-

[1] "R." refers to "Volume I, Transcript of Record," and "J.A." refers to the "Joint Appendix," filed in the court of appeals.

tion for a writ of certiorari was filed on October 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 13–14 of the Appendix to the petition.

QUESTIONS PRESENTED

Whether, in the circumstances of this case, the employer violated his statutory obligation to bargain in good faith by:

1. Refusing during the course of contract negotiations to furnish the union with information about his financial status, where he had predicated bargaining demands for a reduction in certain employee benefits on the unprofitability of the plant's operations;

2. Terminating the existing procedure for adjusting grievances and instituting a new one, without first giving the union an adequate opportunity to bargain about the change.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *Refusal to furnish financial information.* Petitioner manufactures building materials in a number of States. Since 1941, the Union[2] has represented the production and maintenance workers at petitioner's largest plant, located in Marrero, Louisiana

[2] Oil, Chemical and Atomic Workers International Union, Local 4–179, AFL–CIO.

(R. 56; J.A. 103, 135, 144). At the time of the events herein, the parties had a collective bargaining agreement for a one-year term ending March 8, 1962, in which petitioner had agreed to job seniority and other provisions which substantially restricted its power to schedule work and make job assignments (R. 58; J.A. 171–179, 243–246). From the Union's standpoint, these restrictions were of substantial importance and had been obtained in collective bargaining over the years at the expense of other economic demands (R. 59; J.A. 246, 254).

In the December 7, 1961, issue of the Marrero plant newspaper, petitioner asserted that it wanted relief from these contractual restrictions because they generated "wasteful" amounts of premium overtime and incentive pay and other production costs. The Marrero plant, petitioner added, had been waging "a hard fight * * * for the past two years" and was in a "squeeze put on by intense competition * * * in our industry" (J.A. 171–179). Accordingly, on February 12, 1962, in the first bargaining session for a new contract, petitioner advanced proposals which had the effect of reducing premium overtime pay and the amount of seniority an employee could earn (J.A. 112, 149–150, 187–193, 217–218). Vice-President Strittmatter explained to the Union that competition and the Marrero plant's poor earnings picture necessitated such changes (R. 59, 60; J.A. 213). Union representative Zebal then asked "why there are no actual dollar figures, when you say you are losing money at Marrero. We have never been shown any figures that apply to the Marrero plant" (R. 60; J.A.

214). Strittmatter replied that net profit figures were not maintained for individual plants, "but from the figures that are available, we can say that * * * Marrero did not produce earnings in 1961" (R. 60; J.A. 214).* When Union representatives suggested alternative methods for reducing costs, Strittmatter replied that such methods would "cost money and with our profit picture as bad as it has been, we have not been able to do as much as we would like" (R. 60; J.A. 215–216).

At the bargaining session on the following day, Company representatives again referred to the "economic penalties" imposed by the restrictive provisions of the expiring contract (J.A. 229, 231–232), and asserted that they could not be ignored because "we are falling further behind at Marrero. Survival is involved. We have some directors that have actually advocated closing the Marrero operation down" (J.A. 229). Union negotiator Martinez replied: "All of us want to see this Company succeed, but we would like Management to understand that we have an obligation to our people—how far can we go? Both sides have to talk sincerely about both sides' problems" (J.A. 230).

---

* Petitioner maintained net profit figures only for the corporation as a whole, calculated by subtracting general corporate costs from total gross profits received from all plants. Gross profit figures were maintained on a plant basis and were calculated by subtracting plant costs, such as wages, depreciation, and insurance, from plant sales. It was petitioner's policy that each of its plants should "stand on its own" and "absorb its proportionate share of general corporate costs" (R. 62–65; J.A. 136–142, 298–299).

At the February 19 bargaining session, Union representative Zebal complained to Strittmatter: "You continually say that Marrero is a sore spot" and "is losing money, but you won't give us any figures." Strittmatter replied that he did not say "Marrero was losing money," but that it "did not make money" (R. 60; J.A. 254–255). When Zebal asked whether the Company's Pittston plant was "in the same shape as Marrero," Strittmatter asserted, "Not at all. Pittston is a profitable operation" (J.A. 255). Palmer, the Union's principal representative, then asked how Marrero "far[ed] as to profit or loss last year." Strittmatter answered: "In this corporation we compute over-all results. We do not break down by plants." When Palmer further inquired how the Company knew "where the trouble was," Strittmatter said: "Our people know at certain operations, whether money has been made or not. On a gross profit basis we do know by plants. But not on a net profit basis." Palmer then asked for the gross profit figures for Marrero, but was told that "this is not information that would be available" (J.A. 257).

When Union representative Martinez suggested that Marrero could improve its profits by assigning more general corporate overhead to other plants, Strittmatter asserted, "CPA's set up how our overhead is distributed. We must set up our books as specified." He added that the Company president had "this message [for] you at Marrero * * * that the margin [of profit] at Marrero is the smallest it has ever been since the depression days." Martinez replied that he had "no quarrel with the fact that

business has been bad, but Marrero still may be making money. * * * Maybe we made a million and one-half at Marrero and [another plant] took up this money in their losses" (J.A. 258–259). Palmer then stated (J.A. 259):

> I have a request to make in behalf of the Union. We would like to have the financial figures at Marrero as to whether or not this plant made a profit, had a loss, or broke even last year.

Strittmatter replied (*ibid.*):

> This is information that you are not entitled to and the answer is no. The Company doesn't give out this information. * * *

In the February 21 negotiations, Strittmatter again referred to the "serious" economic condition at Marrero to support the Company's demands for removal of the restrictions contained in the expiring contract. Palmer replied that the Company was actually "arguing an inability to pay," and that, "if you are arguing for relief * * * in saying you must get your costs down because Marrero is in trouble, it would behoove you guys to show us some profit pictures for Marrero." When Strittmatter pointed out that he "only said that Marrero did not make any money last year," Palmer added, "You said you had a gross profit picture. You could show us this." Strittmatter then asserted that it was "corporation policy not to disclose these figures," and that the Company had "the ability to pay whatever we think is right to pay" but the problem remained "to get costs down" (R. 61; J.A. 269–270).

In a final negotiating meeting called by a federal mediator on May 1, 1962, Works Manager Dickson reiterated petitioner's position that "anything that results in cost penalties must be eliminated" and that "we must turn Marrero around [toward profits] or we could lose Marrero, or most of Marrero" (R. 61; J.A. 296–297). When Palmer indicated that his people could not be persuaded to accept petitioner's proposals without seeing the Marrero financial records, Dickson replied that "we maintain no profit picture by plant" and that "gross profit for Marrero was available but * * * was confidential and would not be given out" (R. 62; J.A. 297–298). After Dickson reaffirmed the Company's policy that each plant negotiated on its own, stood on its own, and had to absorb its proportionate share of corporate costs, Palmer said (J.A. 299):

> We would like to see that [gross profit picture]. You haven't convinced us that Marrero is in bad shape. If you can show us, then this Union will be willing to work with you to give relief.

2. *Unilateral changes in the grievance procedure.* The contract which expired on March 8, 1962, also contained a detailed grievance and arbitration procedure, under which grievances were first discussed between Union stewards or committeemen and Company foremen and then, if not settled, between Union agents and successively higher ranking Company officials. The employee involved could initiate and participate in the first step discussion if he so desired; in the succeeding steps, only the Union presented the

grievance (R. 60; J.A. 102, 163–169). During the negotiations for a new contract, the only change which petitioner proposed to make in this machinery was to reduce the number of members on the Union grievance committee (J.A. 192).

On March 27, while negotiations were suspended, petitioner "informed" two Union representatives that it was instituting its own grievance procedure because the contract had expired. Without discussion or bargaining, notice of the new procedure was posted that same day and amended the following day (R. 80–81; J.A. 95–96, 106–107). The Union's role in the new procedure was substantially diminished. Access to the grievance procedure was controlled by the complaining employee, and the Union could participate only if the employee desired (R. 81; J.A. 104–106).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

The Board found that petitioner, by basing its demands for concessions from the Union on the claim that the Marrero plant was in a poor competitive position and was not being operated profitably, was asserting a financial inability to continue paying existing wage costs. The Board further found that petitioner had meaningful financial information which it could have furnished the Union, and that, by refusing to do so, it violated its bargaining obligation under the Act (R. 64–65). The Board also found that petitioner's "unilateral establishment of a new and different [grievance] procedure was a change in terms and conditions of employment 'in derogation of

the Union's representative status,'" and thus a further violation of Section 8(a)(5) of the Act (R. 81). The Board ordered petitioner, *inter alia*, to cease and desist from the unfair labor practices found, and to furnish the Union, upon request, with all financial records which it "shall be entitled to see" (R. 88–89, 123).

The court of appeals sustained the Board's findings, and, with a modification not here pertinent, enforced its order (Pet. 15–20).

ARGUMENT

The decision of the court of appeals, which turns on the particular facts of this case, is correct and is not in conflict with the decision of any other circuit. There is no occasion for further review. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409–410.

1. This Court has recognized that an employer violates his bargaining obligation under Section 8(a)(5) of the Act (Pet. App. 13) if, during the course of contract negotiations, he relies on his financial condition to support his demands for certain terms and conditions of employment, but refuses to furnish the bargaining representative with information which would enable it to evaluate and respond to the financial claim. *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149.[4] The Board and the court of ap-

[4] Accord: *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (C.A. 2); *National Labor Relations Board* v. *Southland Cork Co.*, 342 F. 2d 702, 706 (C.A. 4); *National Labor Relations Board* v. *Taylor*, 338 F. 2d 1003 (C.A. 5), enforcing 141 NLRB 765, 766–767; *National Labor Relations Board* v. *Western Wirebound Box*, 356 F. 2d 88 (C.A. 9).

peals correctly applied this principle to the present case.

The question whether financial inability has been placed in issue by the employer is to be determined from all the circumstances. *National Labor Relations Board* v. *Taylor*, 338 F. 2d 1003 (C.A. 5), enforcing 141 NLRB 765, 766–767. In view of petitioner's repeated assertions that it had to cut labor costs because the Marrero plant was not competitive, had not made money and had a low profit margin (pp. 3–7, *supra*), the Board was warranted in concluding that the changes proposed were predicated upon its financial inability to continue under the existing contractual restrictions.[5] Contrary to petitioner (Pet. 7–9),

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Similarly, refusals to furnish wage data and related information, relevant to the intelligent performance of the bargaining representative's function, violate the Act. See, *e.g.*, *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9); *Sylvania Electric Products, Inc.* v. *National Labor Relations Board*, 358 F. 2d 591 (C.A. 1), certiorari denied, October 10, 1966, No. 373, this Term; *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2).

[5] The cases relied upon by petitioner (Pet. 9) involved distinguishable factual situations. In *Dallas General Drivers, Local No. 745* v. *National Labor Relations Board*, 355 F. 2d 842 (C.A.D.C.), the company "agreed that it had a lucrative business" and urged only that it was "unable to get more business, because it was paying substantially more in wages than were its competitors" (151 NLRB 1359, 1360). And in *United Fire Proof Warehouse Co.* v. *National Labor Relations Board*, 356 F. 2d 494 (C.A. 7), the court found that the company's overall profit figures were irrelevant where it was merely contending that a wage cut was required to enable it to show a profit on the local-moving phase of its business and had, in fact, given the union the "figures relating to local moving" (*id.* at 495).

there was an adequate showing that the requested financial information was relevant. As in *Truitt,* the employer himself demonstrated its relevance by referring to the data in question to support his bargaining demands and by arguing, in effect, that he could not continue to pay the costs generated by the prior contract. See *Curtiss-Wright Corp.* v. *National Labor Relations Board,* 347 F. 2d 61, 69 (C.A. 3).

Petitioner admittedly possessed gross-profits data for the Marrero plant (see n. 3, *supra*), and the Union could have obtained further enlightenment on the issue of petitioner's ability to continue under the prior contractual restrictions by deducting Marrero's portion of the company-wide overhead from its gross profits (R. 65). The Board properly concluded that, by withholding this relevant and available information, the Company defaulted in its bargaining obligations.[6]

2. There is no merit in petitioner's contention that its termination of the prior grievance procedure and establishment of a new one was too "trivial" and "temporary" to constitute an unfair labor practice. Under the prior grievance procedure, the Union had

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[6] Contrary to petitioner (Pet. 8–9), the Union did not waive its right to the information. Such a waiver must be clear and unmistakable. See *National Labor Relations Board* v. *The Item Co.*, 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836; *National Labor Relations Board* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475, 477 (C.A. 5); *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971. Here, the Union repeated its request numerous times up to and including the last bargaining session (R. 65–66; J.A. 214, 254–255, 258, 269, 297–299).

the right to participate in all discussions and controlled access to the higher stages of review. Under the procedure substituted by the Company, however, the employee could file grievances only with Company officials and the Union could participate in the discussions only if the employee so desired. The new procedure obviously was in derogation of the Union's role in adjusting grievances—a procedure which is "at the very heart of the system of industrial self-government." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581. The employer's action "minimize[d] the influence of organized bargaining * * * by emphasizing to the employees that there [was] no necessity for a collective bargaining agent." *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 385. Even if temporary, the Company's action "must of necessity [have] obstruct[ed] bargaining." *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 747.

Nor can petitioner rely on the existence of a general impasse to justify its unilateral action (Pet. 11). As the court below pointed out (Pet. App. 16–17), the Company's failure to bargain in good faith was a substantial cause of the impasse. Moreover, even a legitimate impasse cannot justify a unilateral change which is substantially different from proposals made in the bargaining prior to the impasse. Cf. *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217. Here, prior to March 27, 1962, the Company had suggested changing the grievance procedure only by reducing the number of grievance committeemen. On that date, it simply "informed" two

Union representatives that it was going to make the quite different changes discussed above; and, on the same day, it posted notice of the changes. "In this setting, it can hardly be said that the union was given the bargaining opportunity to which it is entitled under *N.L.R.B.* v. *Katz*, 369 U.S. 736 * * * and *N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217 * * *." *Industrial Union of Marine and Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615, 620 (C.A. 3), certiorari denied *sub nom. Bethlehem Steel Co.* v. *National Labor Relations Board*, 375 U.S. 984.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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National Labor Relations Board.

NOVEMBER 1966.

[7] The "similar advance notice" referred to by the Company (Pet. 11) related to an altogether different subject, insurance, which was extensively explored by the parties in their prior bargaining (see R. 121).

U.S. GOVERNMENT PRINTING OFFICE: 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

THE CELOTEX CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 710

THE CELOTEX CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

An employer declining to produce financial information upon request violates § 8(a)(5) of the National Labor Relations Act only if the facts sought are relevant in the bargaining context. If they are not relevant, there is no violation. In its Brief in Opposition, the Board materially distorts the bargaining context by its failure to mention the controlling and undisputed fact that Petitioner was offering a general wage increase and more costly benefits (Pet. 4); moreover, the Board virtually concedes the irrelevancy of the requested data.

THE BOARD'S CONCESSION.

During negotiations, the Union's requests related to the "gross profits picture" at the Marrero plant (Board's Brief, pp. 6-7). The Trial Examiner understood that the Union was asking for gross profits and nothing more. In his Intermediate Report, he stated that while Marrero's gross-profit figure would not have been as meaningful to the Union as a net-profit figure, "it does not follow that the gross profit figure would have been meaningless" (R. 65). The Board adopted the Trial Examiner's view on this subject (R. 120).

The Court of Appeals' opinion holds in part:

> We therefore hold that the Board properly found that Celotex violated Section 8(a)(5) and (1) of the Act by refusing to disclose to the Union certain of its financial records, including the "gross profits" of the plant, and by unilaterally changing the existing grievance procedure. (Pet. 19)

The Court, the Board and the Trial Examiner all understood that the figures in issue were the gross profits of the Marrero plant. Now, in its Brief in Opposition, the Board virtually concedes that gross-profit figures were meaningless, and therefore irrelevant. At page 11 of its Brief, the Board says:

> Petitioner admittedly possessed gross-profits data for the Marrero plant (see n. 3, *supra*), and the Union could have obtained further enlightenment on the issue of petitioner's ability to continue under the prior contractual restrictions *by deducting Marrero's portion of the company-wide overhead from its gross profits* (R. 65). (Emphasis added.)

The Board's implied concession that gross figures are irrelevant derives from its suggestion that the Union negotiators could deduct "Marrero's portion of the company-wide overhead from the plant's gross profits." The negotiators certainly were not equipped to decide for themselves what Marrero's portion of the overhead should be. Before they could have carried out what the Board now suggests, they would have needed a formula for allocating the overhead burden to 8 plants according to appropriate accounting principles. No formula existed; the Court below found: "No proration by plant of corporate overhead items was in existence" (Pet. 18).

The Board's new position adds a dimension not present in the case before. It highlights Petitioner's contention that the gross figures were devoid of meaning and, in fact, would only have confused the negotiators. If the information demanded is meaningless, it is likewise irrelevant. Without a showing of relevance, an employer's refusal is not a violation of § 8(a)(5) of the Act.

CONCLUSION.

Records must be produced only if relevant. Information relating to wages is presumptively relevant; if the records requested do not relate to wages, the Union must demonstrate the relevance of the data it desires. In the present case, the Fifth Circuit misapplied these principles and created a new rule for profit data that puts the burden of showing irrelevance on the employer. In this, the Court is in conflict with the other four Circuits, as noted at pages 6-10 of the Petition.

It is respectfully urged that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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